IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Appeal No. 22,142

NTERMOUNTAIN RESEARCH AND ENGINEERING COMPANY, INC., IRECO CHEMICALS, AND IRON ORE COMPANY OF CANADA,

Plaintiffs-Appellants,

v.

ERCULES INCORPORATED AND KAISER STEEL CORPORATION,

Defendants-Appellees.

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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REPLY BRIEF OF PLAINTIFFS-APPELLANTS

It is apparent from the brief of defendants-appellees that the following matters are not in dispute:

1. Jurisdiction of the District Court.

2. Jurisdiction of this Court.

3. The Faber patent, No. 1,529,778, and the Taylor, et al patent, No. 2,481,795, constitute the entire prior art relied upon by appellees, the moving party.

4. The Faber patent describes a non-explosive sparkler mix applied to, and dried on, wires for children to use in celebrating the Fourth of July.

5. The Taylor patent is not concerned with an explosive slurry, nor does it mention any explosive that contains *either* water or aluminum.

6. The Ursenbach, et al patent in suit, No. 3,113,059, is not anticipated by Taylor.

There are only two real issues on this appeal. They are whether on this record, and without a trial or the benefit of expert testimony, this Court can say:

1. that the claims of the patent in suit are "anticipated" under 35 U. S. C. § 102(b) by Faber, or

2. that the claims of the patent in suit were obvious in 1964 to one skilled in the explosive art from the combined teachings of Faber and Taylor.

Appellees' brief does not attempt to meet either of these issues squarely. Instead, appellees' brief talks superficially about "inventive concept" (pp. 15-18), "the problem" and "the solution" (pp. 24-25), "patentable distinction", "patentable significance" and "original thinking" (pp. 26-29), the lack of correctness of the prior art theory (pp. 34-36), and whether the trial court's findings are supported by the record (pp. 40-44).

Appellees' very failure even to discuss the language and substance of the *claims* of the patent in suit demonstrates at once the weakness of their position. We shall deal first with these two basic issues, and then comment on appellees' erroneous, but merely peripheral, attacks.

I. The Patent Claims Certainly Are Not Anticipated By Faber

Appellees' brief argues at pages 24 to 30 that the patent in suit is "anticipated" by the prior Faber patent.

Appellees have cited no authority supporting a finding of anticipation under 35 U. S. C. § 102(b) (even after a trial) where there is not identity or complete equivalence between what is described in the prior art and what is claimed in the patent in suit. Appellees' attempt to distinguish this Court's decision in *Stauffer* v. *Slenderella Systems of California,* 254 F. 2d 127, 128 (9 Cir. 1957) in the footnote on page 28 of its brief assumes a state of facts that is not so. Appellees' brief pointedly disregards

ne following more recent language of this Court on this ery point in *Walker* v. *General Motors Corporation,* 362 '. 2d 56, 58 (9 Cir. 1966):

> "As to claims 1 and 2, defendants contend that the defense of anticipation was established despite the difference relied upon by plaintiff, because the separate and the single-unit constructions are equivalent. But plaintiff tendered evidence that the difference in physical construction produced significantly different results from the point of view of safety and ease of repair. Compare United States v. Adams, 383 U. S. 39, 86 S. Ct. 708, 15 L. Ed. 2d 572 (1966). Since the issue of equivalence could not be determined without resolving these disputed questions of fact, we conclude that as to claims 1 and 2 *summary judgment on the grounds of anticipation was not appropriate.** [Citing cases.]"

Lack of identity between the *claims* of the patent in suit nd the description of Faber is perfectly clear from the ollowing facts which appellees' brief does not deny but ries to brush aside as "immaterial".

1. Faber does not teach, suggest, or describe a composition that is either a blasting agent or an explosive system, whereas, all claims of the patent in suit specify either 'An aqueous slurry blasting agent" or "An aqueous explosive system".

2. Faber does not teach, suggest, or describe any composition containing an ammonium or alkali metal phosphate calcium is not an alkali metal). All claims of the patent n suit specify "a phosphate selected from the group consisting of ammonium and alkali metal phosphates".

The foregoing differences (as well as others pointed out n our main brief at pages 6, 7, 15 and 16) are more than mmaterial word or semantic differences, as appellees argue.

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* Emphasis added unless otherwise indicated.

Appellees' brief throughout argues that the "problem" faced by the patentees and by Faber was the same. This is patently untrue.

The problem faced by the patentees Ursenbach and Udy was a problem dealing specifically with aqueous slurry blasting explosives that contained over 50% of ammonium and sodium nitrates, 8 to 20% of aluminum and about 10 to 15% of water. The patent states (R 83, col. 2, 11. 54-55) that such slurries "showed excessive gassing after storage at room temperature for two weeks." The problem, therefore, was to inhibit this gassing *without interfering with the subsequent effectiveness of these slurries* as blasting agents or explosives. Here again, the patent in suit is specific, stating that when very small amounts of certain named phosphates were added to these slurries (R 83, col. 2, 11. 60-64):

> "The resulting inhibited slurries were stored for three months without evidence of gassing. The stored slurries were fired in six inch boreholes with 160 gram pentolite boosters. *All charges fired satisfactorily.*"

The patent in suit states that one of its objects (R 83, col. 1, ll. 46-49) is to provide stable aluminum-containing aqueous slurry blasting agents "which may be stored for extended periods without decomposition". Decomposition of the aluminum obviously would interfere with the subsequent use of these products as blasting agents.

Faber's problem was entirely different. Faber was concerned with a *non-explosive* thick syrup of dextrin (a sugar) in water to which was added aluminum powder, finely divided iron and steel filings, barium nitrate and magnesium carbonate in unspecified amounts. This mix was said to "bubble and boil", foaming up over the top of the tub and generating a great deal of heat within a few hours after mixing. (Whether it occurred 3 or 6 hours after mixing is unimportant.)

Thus, even though in both cases there may, at *some* age, have been an evolution of hydrogen produced by reaction of aluminum with water, the problems of Faber nd of the patentees of the patent in suit were manifestly ot the same. As appellees well know, the aqueous slurry lasting agents of the kind claimed in the patent in suit o not "bubble and boil" nor require any inhibitor nor any reatment to prevent gassing when they are to be exploded ithin 2 or 3 days after mixing.

Appellees' brief argues (pp. 38-39) that gassing oc-urred with the patentees' slurries in 6 hours, but this is ot true in normal use. Example 1 of the patent, on which his misleading argument of appellees is based, is clearly tated in the patent to be a special accelerated gassing est carried out with special mixtures heated to 81°C. 177.8°F.), whereas the claimed blasting slurries in normal se are stated to be stored at "room temperature".

At the very least, the questions of whether the claimed lasting agents are equivalent to Faber's sparkler mix, nd whether the claimed phosphate inhibitors are the equiv-lent of Faber's different calcium mono acid phosphate, aise issues of fact which cannot be resolved by summary udgment.

In addition, the solutions proposed by the patentees and y Faber to their respective different problems involved undamentally different chemical reactions.

I. Faber Taught An Entirely Different Solution To His Problem And Failed To Teach The Solution Adopted By The Patentees

We have seen that the prior art Faber patent says it vas dealing with a mixture that fermented, bubbled and oiled three to six hours after it was mixed. Whether ightly or wrongly, Faber attributed this fermenting to a hemical reaction between the aluminum and water *in his ixture* and pointed out that this reaction was accelerated y the alkalinity of his mix.

The teaching of Faber is that there are many factor in his particular mix which tended to make it alkaline. H speaks not only of ammonia but other by-products that ar also alkaline; the fact that the magnesium carbonate h used was noticeably alkaline; and the fact that sometime the tap water was alkaline (R 74, 11. 56-74).

Faber makes a special point of teaching that the spee of the reaction between finely divided aluminum and wate was increased with increased alkalinity (R 74, 11. 60-62).

Thus, Faber proposed as *his* solution use of what h calls a "buffer" to prevent or neutralize this alkalinity It is perfectly plain from the statement of Faber quote on page 6 of our main brief that Faber considered a grea many acids and acid salts to be satisfactory for this neutra ization, even though he mentioned calcium mono phosphat as "the best example" of such an acid salt.

The term "buffer" is seldom used alone by the chemis The first question asked is a "buffer" for what, or agains what? Any chemist knows that if an acid condition in system is to be buffered, the buffer should be alkaline i nature to neutralize the acid to be buffered. And, co versely, if an alkaline condition is to be buffered in a chem cal system, the buffer to be used necessarily has to be of a acidic nature.

Appellees' brief quotes, in part (footnote, p. 5), th definition of the term "buffer" from the 1953 edition o "The Van Nostrand Chemist's Dictionary" at page 10 The complete definition in this dictionary is as follows:

> "BUFFER. A substance that enables a syste or entity to resist changes in conditions, mechanica shocks, addition of foreign substances, etc. As th term is most commonly used in chemistry, a buffe is a substance which, upon addition to a syste renders the hydrogen ion concentration resistant t or less sensitive to, additions of acidic or alkalin substances. There are other chemical buffers, hov ever, such as the oxidation-reduction buffer, whic tends, in the same way, to stabilize the **oxidatio reduction potential** of a system."

To a chemist, therefore, Faber's description proposes only the use of a mild acid or acid salt kind of buffer for the purpose of buffering by neutralizing the alkalinity in, or developed in, his sparkler mix. Faber recommended calcium mono acid phosphate as one acid salt particularly suitable to buffer, by neutralizing, the alkalinity in his mix. There is not one word in Faber's description to suggest that this particular acid salt is effective because it is a phosphate. Most important, there is no suggestion whatsoever in Faber's description that *other phosphates* (acid or alkaline) would prevent the bubbling and boiling of Faber's sparkler mix.

Faber's total teachings are summarized in his three claims (R 75) which state that a buffer is added "in such amount as to maintain an acid reaction to the mass" (claims 1 and 2), and that a material having an *acid reaction* is added in sufficient excess "to impart a distinct acid reaction to the entire mixture." (claim 3).

The patentees simply did not follow this teaching of the prior Faber patent in their use of different phosphates, regardless of whether they were acid or alkaline. For example, trisodium phosphate given as one example in the patent in suit (R 83, col. 2, ll. 57-58) is a notoriously alkaline salt and exactly the type of compound that should not be used to buffer alkalinity, according to Faber's teaching.

Appellees' brief (p. 35) suggests that maybe Faber's theory was wrong. This is indeed a bootstrap argument because we are here concerned only with what Faber's description taught the art, not with what might have been. This entire argument is founded on the absurdly incorrect premise (p. 36) that Faber's sparkler mix would today infringe the claims of the patent in suit, and that that which if later infringes, if earlier, anticipates. Faber's mix is not a blasting agent or explosive system and does not contain one of the claimed phosphates. Neither anticipation nor infringement of these claims is involved, as we have already shown (*supra,* pp. 2-5).

Appellees' arguments along this line are the kind o argument that applies only where one is trying to repaten an old composition. That is not true here where there is n anticipation, there has been no attempt to repatent Faber' old sparkler mix, and the issue comes down to the questio of obviousness under 35 U. S. C. § 103.

Faber teaches the use of a mild acid or acid salt to buffe the alkalinity of his sparkler mix until this mix can b coated on iron wires and dried. The patentees on the othe hand discovered and claimed that a certain class of phos phates, not even suggested by Faber, stabilize their slurr blasting agents for storage—as wet slurries—for period up to three months.

These are different solutions to different problems an appellees' argument as to chemical equivalence immedi ately injects issues of material fact that cannot properl be resolved on summary judgment.

III. The Claimed Invention Of The Patent In Suit Wa Not Obvious From The Teachings Of Faber An Taylor.

Appellees' argument on obviousness (pp. 30-33), state baldly and simply, is that it was obvious to use the phos phates mentioned by Taylor as the buffer salt in Faber' mix.

One complete answer to such an argument is that th mere substitution of Taylor's phosphate as the acid sal buffer in Faber's sparkler mix would still not anticipat a single one of the claims of the patent in suit. Faber' mix with such a substitution would still not be a slurr blasting agent or explosive system as *claimed.*

Another complete answer to this argument of appellee is that the total combined prior art teaching of both Fabe and Taylor is the use of an acid salt to buffer alkalinity whereas the patentees do not utilize any buffering action a shown by the affidavit of Ursenbach (R 121-2).

Appellees complain bitterly (pp. 3, 34, 35) that the patent in suit does not explain any theory as to why the claimed phosphates act to stabilize the slurry blasting agents during storage. It is, of course, axiomatic that a patentee does not have to have a theory or even to understand why or how his invention works. The important point, as we explained fully on pages 21 and 22 of our main brief, is that the patentees' phosphates cannot possibly function as acidic buffers to neutralize alkalinity. They work because they are phosphates, not because they are the acid salt buffers of alkalinity taught by Faber and Taylor.

On this point, the affidavit of Ursenbach is specific (R 121-2). Appellees' attack (pp. 7-8) on his qualifications as an expert is absurd (*infra,* p. 14).

Appellees repeatedly get the cart before the horse in arguing (pp. 4, 26, 34, 39) that there is nothing in the record to prove that Faber's calcium mono acid phosphate would be inoperative to stabilize the patentees' slurry blasting agents. If appellees, as the moving party, wanted to contend that Faber's acid salts, including calcium mono acid phosphate, would stabilize blasting slurries, *they* should have produced evidence to this effect. Appellees were the moving party.

Appellees are not in any position to ask this Court *to assume,* without a shred of supporting evidence, that calcium mono acid phosphate would be as effective as the phosphates specified in the patent claims, or even that this particular phosphate would be effective at all in the claimed blasting slurries. Appellees well knew that the mere offering of any such evidence by them would immediately raise a material fact issue precluding any decision by summary judgment.

A. The Taylor Patent Has Absolutely Nothing To Do With The Invention Claimed In The Patent In Suit

Appellees' brief admits (pp. 6, 30, 44) that the prior Taylor patent was cited only to show that certain phosphates had been used as buffer salts in nitrate explosives.

Appellees do not deny, however, that Taylor was dealin with a dry explosive that did not contain either aluminur or water and, therefore, could not have possibly involve any chemical reaction of aluminum and water. Taylor' description on its face has absolutely nothing to do wit the use of phosphates to inhibit or buffer a chemical rea tion between aluminum and water.

The only references to phosphates in the Taylor pate are in column 3, lines 60-69, and column 4, lines 21-2 (R 77). Here, Taylor was talking about a possible reactio between ammonium salts and the metal carbonate in hi dry explosive and suggesting the use of certain acid phos phates only, or a "non-alkaline mixture" of such salts, t neutralize alkalinity. The teaching of Taylor may hav some remote connection with the teaching of Faber in ne tralizing alkalinity, but that is not what is claimed in thei patent by the patentees.

Appellees' brief says (p. 25) "It is undisputed by appe lants that diammonium hydrogen phosphate and alka metal phosphates are buffers." This is absolutely wrong Neither Faber nor Taylor mentions or suggests the use o *diammonium hydrogen* phosphate in any explosive or othe composition, nor do either of these prior patents say tha this compound is a buffer for anything. Diammoniu hydrogen phosphate is the preferred stabilizer of the pat entees specified in claims 3 and 4 of the patent in suit. W repeat, this compound is neither mentioned nor suggeste by either Faber or Taylor. This compound is alkaline i nature and could not serve as a buffer for alkalinity in a aqueous chemical system. What the Taylor patent doe mention is *ammonium dihydrogen* phosphate which is acidi in nature (because it contains more hydrogen than ammo nium). All that Taylor taught the art was the use of certai acid phosphates to neutralize alkalinity in a substantiall dry system devoid of aluminum.

Taylor has nothing to do with either an aluminum-wate reaction or aqueous blasting slurries.

IV. Appellees Have The Burden Of Proving Invalidity Of The Patent In Suit And The Presumption Of Validity Is Not Destroyed

Appellees' brief argues (p. 23) the patent in suit has *no presumption* of validity and any presumption was "destroyed" by "the existence of pertinent prior art not cited by the Patent Office".

35 U. S. C. § 282 not only states that a patent should be presumed valid, but also that the burden of establishing invalidity rests on the party asserting it. Appellees' argument is based on appellees' *assumption* that Faber and Taylor are more pertinent than the prior art cited by the Patent Office. Appellants do not agree that this assumption is correct and, therefore, appellees' assumption at the outset raises a material issue of fact precluding summary judgment on this premise.

Furthermore, even if Faber and Taylor were more pertinent, it does not follow that the presumption of validity is "destroyed". The authorities cited in appellees' brief do not support this argument, and we know of no decision of this Court, or of any other Circuit Court of Appeals, that goes that far.

This is simply another cart-before-the-horse effort by appellees to avoid their own burden of proving invalidity, if they can, and to try to shift that burden to appellants. Of course, the presumption of validity is rebuttable. But on the record before this Court, no evidence has been offered by appellees which rebuts it.

V. No Merit In Appellees' Criticism Of Appellants' Statement Of The Case And Of The Deficiencies In The Trial Court's Findings

Appellants reiterate that the District Court findings and conclusions are based entirely on the Court's own interpretation of the patent in suit and the prior art patents

cited. Furthermore, the findings do not mention and, there fore ignore, the Ursenbach affidavit. This Court can see from the transcript what was said at the oral argument on this patent, and we believe the foregoing statements are entirely justified by that transcript.

The findings adopted by the District Court, like the arguments in appellees' brief, are an oversimplification of the issues involved. Wherever appellees cannot meet the point, it is said to be immaterial. For example, appellees say (p. 14) the findings "are as complete as is necessary" (p. 26) "there is no criticality" in selecting the claimed phosphates; (p. 27) the exact amounts of the phosphates claimed is unimportant; (pp. 34-35) "the mechanism of inhibition is not an issue"; and (pp. 35-36) whether Faber understood his own prior art theory is "immaterial".

The findings of the District Court amount to an improper resolution, without trial, of complicated issues of chemical facts. Neither the Court nor trial counsel for either side was in a position of expert witness on this summary judgment motion.

VI. Appellees' Arguments Are A Succession Of Attempts To Avoid The Burden On The Moving Party

The law of this Court, as in all the other Circuits, is that a party moving for summary judgment has the burden of proof, and that the "slightest doubt" as to the facts or conclusions to be drawn from them require denial of the motion.

In *Cox* v. *American Fidelity & Casualty Co.,* 249 F. 2d 616 (9 Cir. 1957), the Court said (pp. 618-19):

> "The summary judgment procedure under Rule 56 has been widely commented upon by all the circuits, but perhaps the best statement on the applicability of the rule was made by the late Judge Jerome Frank of the Second Circuit, when he elaborated on the 'slightest doubt' rule enunciated by the First Circuit as follows:

> "'We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment. *A litigant has a right to a trial where there is the slightest doubt as to the facts, and a denial of that right is reviewable;* but refusal to grant a summary judgment is not reviewable. Such a judgment, wisely used, is a praiseworthy time-saving device. But, *although prompt dispatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established. Denial of a trial on disputed facts is worse than delay.* * * *
>
> The district courts would do well to note that time has often been lost by reversals of summary judgments improperly entered.' Doehler Metal Furniture Co. v. United States, 149 F.2d 130, 135."

Although appellees are the moving party, the arguments on many points in their brief are founded upon assumption and innuendo, not proof.

For example, appellees' brief (pp. 4, 16-17) argues that the patent in suit does not involve aqueous slurry blasting compositions *per se*. This argument, of course, ignores the plain language of the claims of the patent. The colloquy quoted in appellees' brief at page 17 does not support the argument. It is true that Ursenbach, et al. patent No. 3,113,059 is not the basic patent in this suit on the aqueous blasting slurries or explosives. The basic patent in suit on these explosives is the Cook, et al. patent, Re 25,695 (R 91-94). It is also true that the phosphates claimed as part of the aqueous blasting slurry compositions in the '059 patent do not make such slurries better blasting agents. But, as the trial court was told, neither do these phosphate additions make these compositions poorer blasting agents and that is a result which one skilled in the art could never learn from studying the Faber or Taylor patents because neither of these prior patents was dealing with an aqueous slurry blasting agent containing aluminum.

Another innuendo argument in appellees' brief (pp. 3-4 26) is that the '059 patent in suit does not give any data as to why only certain phosphates were disclosed and claimed as stabilizers. This overlooks paragraph 3 of the Ursenbach affidavit (R 121) showing that out of the many materials tried, these particular phosphates worked best But, more important, appellees have the burden of es tablishing positively that this is not critical, if they wish to argue this point as part of their case on a motion for summary judgment.

Furthermore, the decision of Judge Barnes in *Stallma* v. *Casey Bearing Company,* 244 F. 2d 905 (9 Cir. 1957) cited by appellees (p. 26) does not support appellees' argument Judge Barnes, in that case, held certain details were no critical because they were not disclosed or claimed in the patent. Appellees are arguing as not critical the specific phosphates, and the specific amounts of those phosphates that are specifically disclosed and claimed in the patent in suit.

Appellees' attacks on the Ursenbach affidavit (brief pp. 7-8, 35, 40) are of the shot-gun type. First, the affidavit (R 121) shows that Ursenbach holds an M.S. degree in chemistry, did three years of graduate work in physical chemistry, worked for nine more years in research in the explosives field, and for the next six years was an Associate Professor at the University of Utah and also worked on research and development in the field of aqueous types of slurry explosives. We believe this qualifies him as an expert.

The remainder of his affidavit states chemical facts and opinions which he will be fully qualified to state as a witness in court. Appellees submitted no evidence or affidavit denying the statements and opinions of Ursenbach, although they had ample opportunity to do so in the trial court. Appellees' attacks on the Ursenbach affidavit in this Court have no merit whatsoever, and are certainly no substitute for any proofs that appellees had the burden of offering, but failed to offer, in support of their motion

VII. Appellees' Arguments That Reaction Conditions Are Identical, And That The Mechanism Of Inhibition Is Not An Issue, Raise Issues Of Fact Going To The Very Heart Of The Motion

Appellees' brief (pp. 37-8) argues that the reaction conditions of the patent in suit and of Faber's sparkler mix are identical, (pp. 34-5) that any difference in the mechanism of inhibition is not an issue, and (p. 33) that what the patentees did was add "a phosphate buffer salt". Ursenbach in his affidavit (R 121-122) states that the phosphates the patentees found successful "are not added to our slurry explosives for the purpose of chemically neutralizing alkaline materials in the slurry", and that he is convinced, as an expert, that the phosphates used as inhibitors in accordance with his patent "do not perform their inhibiting function by reason of any buffering action."

We have already shown (*supra,* pp. 4-8) that the reaction conditions of Faber and of the patentees are far from identical. In Faber, an acid salt is used as a buffer to neutralize alkalinity in the mix. In the slurry explosive of the patentees, there is no alkalinity to be neutralized and the inhibitors claimed in the patent include phosphates that by their very chemical nature could not possibly serve as a "buffer" to neutralize alkalinity. If one thing is clear on this record, therefore, it is that the phosphates claimed by the patentees are effective not because they are acid salt buffers, but because they are phosphates.

Faber nowhere suggests to a chemist that his mild acids, acid salts, or the specific compounds he mentions, sodium acetate and calcium mono acid phosphate, are effective because they are phosphates. If any conclusion is to be drawn on this record, it must be that the use of the phosphates claimed by the patentees was not taught by, and was not obvious from, the "buffer" teachings of the prior art Faber and Taylor patents.

CONCLUSION

The Judgment holding patent in suit 3,113,059 invali
and dismissing the Complaint as to said patent should b
reversed with an award of costs to appellants.

Respectfully submitted,

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I certify that, in connection with the preparation of his brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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